TEOH HENG SENG & ORS

v.

TEOH KIEW SENG & ANOR

COURT OF APPEAL, PUTRAJAYA
DENIS ONG JCA
PAJAN SINGH GILL FCJ
HASHIM YUSOFF JCA
[CIVIL APPEAL NO: P-02-858-1999]
9 MARCH 2005

TRUSTS: *Land - Land transferred to defendants by deceased father - Whether land held on trust for plaintiffs/siblings - Whether trial judge correct in finding there was no trust*

The plaintiffs claimed that a certain land ('the subject land') transferred to the defendants by their deceased father was held on trust for them. The trial judge dismissed the plaintiffs' claim with costs. Hence, the plaintiffs' appeal. It was not disputed that there was no formal declaration of trust in respect of the subject land. However, the plaintiffs' alleged that their deceased father, by way of oral declarations and letters, had envisaged that the subject land was held on trust for them. The defendants denied the allegation.

Held (dismissing the appeal)
Per Pajan Singh Gill FCJ delivering the judgment of the court:

[1] The trial judge had sieved through the documentary and oral evidence that was produced in court. The trial judge also explained in his judgment his reservations about the strength and weakness of each of the witnesses, be they plaintiffs' or defendants'. The trial judge found them, being family members, partisan and had no qualms about saying or denying anything that suited them. The guiding principle the trial judge held was not the "truth" but "benefit". (p 19 d-e)

[2] A declaration of trust may be made within the Torrens System of land registration provided the declaration is made either formally or informally. If informally there is a caveat – the words used must be clear and unequivocal. There was no legal challenge made by the plaintiffs on the ability to create an oral trust in respect of the subject land within the Malaysian landscape of land registration. There was also no challenge mounted by the plaintiffs on the indefeasibility of title of the subject land that was registered in the names of the 1st and 2nd defendants. What was

merely raised to reiterate was that the subject land was held to be on trust for the plaintiffs. It followed that it was the credibility of witnesses that the appellant took exception to and sought intervention of this court to reverse the findings of the court below. (pp 19 f, 20 b-c)

[3] A review of the factual evidence afresh showed conflict, awkward pauses and general hesitancy in respect of both the plaintiffs' and defendants' witnesses. That might not have inspired confidence with the trial judge. (p 20 d)

[4] The appellate court will consider that if the trial judge has drawn attention to the discrepancies in testimonial evidence and considered them, there can be no further ground for complaint. This is given that the appellate court does not have the advantage of seeking and hearing the witnesses. In the present case, there was nothing in the treatment of the witnesses' evidence by the trial judge that warranted appellate interference. Admittedly, the flaw of the trial judge might have been in not adverting specifically to the discrepancies in evidence in his judgment. However, the trial judge had not rejected the evidence of the witnesses wholesale but carved aspects of the evidence to support various strengths of the case. Having done so, the trial judge relied on the non-partisan evidence of the solicitor responsible for the transfer of the subject land. (p 21 b & f-g)

*[**Bahasa Malaysia** Translation Of Headnotes*

Plaintif-plaintif menuntut bahawa sekeping tanah ('tanah tersebut') yang dipindahmilik kepada defendan-defendan oleh mendiang ayah mereka diamanahkan kepada plaintif-plaintif. Hakim perbicaraan menolak tuntutan plaintif dengan kos. Maka, rayuan plaintif-plaintif ini. Ianya tidak dipertikaikan bahawa tiada deklarasi yang formal mengenai amanah tersebut. Namun demikian, plaintif-plaintif mendakwa bahawa mendiang ayah mereka, melalui deklarasi-deklarasi dan surat-menyurat, menganggapkan harta tersebut diamanahkan kepada plaintif-plaintif. Defendan-defendan pula menafikan dakwaan tersebut.

Diputuskan (menolak rayuan)
Oleh Pajan Singh Gill HMP menyampaikan penghakiman mahkamah:

[1] Hakim perbicaraan telah menapis keterangan dokumentari dan lisan yang dikemukakan di mahkamah. Hakim perbicaraan juga telah menjelaskan di dalam penghakimannya kesangsiannya mengenai kekuatan dan kelemahan setiap orang saksi, meskipun saksi-saksi plaintif-plaintif ataupun saksi-saksi defendan-defendan. Hakim perbicaraan mendapati mereka sebagai ahli-ahli

keluarga berat sebelah dan tiada keberatan untuk mengata atau menafikan apa-apa mengikut kesesuaian diri mereka. Panduan prinsip yang hakim perbicaraan mendapati bukan 'kebenaran' tetapi 'faedah'.

[2] Suatu deklarasi amanah boleh dibuat dalam pendaftaran tanah Sistem Torrens dengan syarat deklarasi tersebut dibuat secara formal atau tidak formal. Jika secara tidak formal terdapat suatu kaveat – kata-kata yang digunakan mesti jelas dan nyata. Tiada cabaran di sisi undang-undang oleh plaintif-plaintif atas kebolehan mewujudkan suatu amanah lisan dalam lingkungan pendaftaran tanah di Malaysia. Juga tiada cabaran oleh plaintif-plaintif atas ketakboleh sangkal hakmilik tanah tersebut yang telah didaftarkan dalam nama-nama defendan pertama dan defendan kedua. Apa yang hanya dibangkitkan adalah untuk menekankan bahawa tanah tersebut diamanahkan kepada plaintif-plaintif. Ianya mengikut bahawa plaintif-plaintif bergantung kepada isu kebolehpercayaan saksi-saksi untuk mahkamah ini bercampurtangan bagi mengakaskan dapatan mahkamah bawah.

[3] Kajian semula keterangan fakta kes semasa menunjukkan konflik, pemberhentiaan sejenak yang teragak-agak dan keraguan keseluruhan kedua-dua saksi-saksi plaintif-plaintif dan defendan-defendan. Itu mungkin tidak mengilhamkan keyakinan hakim perbicaraan terhadap keterangan tersebut.

[4] Mahkamah rayuan akan menimbangkan bahawa jika hakim perbicaraan telah memberi perhatian kepada ketidaksamaan dalam keterangan testimoni dan telah menimbangkannya, maka tiada alasan untuk membuat aduan lagi. Ini disebabkan mahkamah rayuan tiada kesempatan untuk memperoleh dan mendengar saksi-saksi. Di dalam kes semasa, tiada apa-apa dalam cara hakim perbicaraan mengendalikan keterangan saksi-saksi yang mengkehendaki campurtangan mahkamah rayuan. Hakim perbicaraan mungkin tersilap apabila tidak merujuk secara khususnya kepada ketidaksamaan dalam keterangan di dalam penghakimannya. Tetapi hakim perbicaraan tidak menolak kesemua keterangan saksi-saksi dan telah mengambil beberapa aspek keterangan tersebut untuk menyokong kes semasa. Setelah berbuat demikian, hakim perbicaraan bergantung kepada keterangan tidak berat sebelah peguamcara yang bertanggungjawab bagi pindahmilik harta tersebut.

Case(s) referred to:
Grant v. Grant 55 ER 776 ***(refd)***
Khoon Chye Hin v. PP [1961] 1 MLJ 105 ***(refd)***
Lee Phek Choo v. Ang Guan Yau & Anor [1975] 2 MLJ 146 ***(refd)***
Lim Teck Chye v. PP [2004] 2 SLR 525 ***(refd)***
Wan Naimah v. Wan Mohamad Nawawi [1974] 1 MLJ 41 ***(refd)***
Watt v. Thomas [1947] AC 484 ***(refd)***
Yew Phaik Hoon v. Quah Ooi Keat & Anor [1969] 1 MLJ 32 ***(refd)***

For the appellant - Karin Lim Ai Ching (Lim Hock Siang with him); M/s Presgrave & Matthews
For the respondent - JA Yeoh; M/s Shearn Delamore & Co

Reported by Usha Thiagarajah

JUDGMENT

Pajan Singh Gill FCJ:

In this appeal before us the plaintiffs/appellants (hereinafter referred to as plaintiffs) appeals against the order of the High Court Judge dated 29 September 1999, wherein the trial judge had dismissed the plaintiffs'/appellants' claim with costs.

The plaintiffs' claim can be neatly enumerated as follows:

(1) The plaintiffs and defendants are siblings and sons of the late Teoh Eng Sneah @ Teoh Eng Seah @ Teoh Eng Siah @ Teoh Sing Kew.

(2) The defendants are the registered proprietors of land known as holding no. 1359, Mukim 15 Daerah Seberang Perai Selatan, Penang.

(3) The said land was previously owned by the plaintiff and defendant's father and uncle.

(4) The deceased father and deceased uncle had apparently owned various other lots of lands jointly.

(5) However, in 1972, following an accident suffered by the deceased uncle, the deceased father and deceased uncle decided to transfer various lands that they had together to family members/children of theirs.

Flowing from this, certain lots namely, Lot 1132 and Lot 1393 were transferred to the 3rd and 4th plaintiffs.

The bone of contention was Lot 1359 which the plaintiffs allege was transferred by their deceased father to the defendants to be held on trust for them.

Though there was no formal declaration of trust in respect of the said Lot 1359, it was envisaged by their deceased father, according to the plaintiffs, by way of oral declarations and letters that the said land (Lot 1359) be held on trust by the defendants for the plaintiffs.

Despite requests being made by the plaintiffs to the defendants that they were entitled to the compensation received in respect of the said Lot 1359, the subject matter of land acquisition, the defendants on their part had refused to part with the said compensation and vehemently deny that the said land (Lot 1359) was held on trust by them for the plaintiffs.

It is the contention of the defendants that they had in fact paid the sum of RM3,000 for the purchase of the said land ie, Lot No. 1359, and had adduced evidence in court as to the manner in which they had raised the said sum of money. This was necessary as it was alleged throughout the trial, as part of the plaintiffs' case, that the defendants were "men of straw" and were unable to raise such a sum of money at the material time.

From the grounds of judgment of the trial judge, we find that the trial judge had sieved through the documentary and oral evidence that was produced in court. The trial judge has also explained in his judgment his reservations about the strength and weakness of each of the witnesses, be they plaintiffs' or defendants' witnesses. The trial judge found them, being family members, partisan and had no qualms about saying or denying anything that suited them. The guiding principle, the trial judge held in this instance was not the "truth" but "benefit".

On the law, we are in total agreement from the host of cases cited before us, that in principle a declaration of Trust may be made within our Torrens System of land registration provided of course the declaration is made either formally or informally. If informally there is a caveat – the words used must be clear and unequivocal. As was stated by Romilly MR in *Grant v. Grant* 55 ER 776 – words declaring a trust:

> need not be in writing ... They must be clear, unequivocal and irrevocable, but it is not necessary to use any technical words, it is not necessary to say, 'I hold the property in trust for you' nor is it necessary to say, 'I hold the same for your separate use.' Any words that the donor means, at the time he speaks, to divest himself of all beneficial interest in the property are, in my opinion, sufficient for the purpose of creating the trust. I think that it is also sufficient for the purpose of showing that the trust has been created, if he afterwards states that he has so created the trust, though there was no witness except the donee present at the time the trust was created.

The cases of *Wan Naimah v. Wan Mohamad Nawawi* [1974] 1 MLJ 41 (FC), *Yew Phaik Hoon v. Quah Ooi Keat & Anor* [1969] 1 MLJ 32 (PC) and *Lee Phek Choo v. Ang Guan Yau & Anor* [1975] 2 MLJ 146 (FC) were cited before the trial judge and reiterated before us.

We gather from the submissions in the court below and even before us, that there was no legal challenge made by the plaintiffs on the ability to create an oral trust in respect of land within our Malaysian landscape of land Registration.

There was also no challenge mounted by the plaintiffs on the indefeasibility of title of the said land, that was registered in the names of the 1st and 2nd defendants. What was merely raised to reiterate, was that the said land was to be held on trust for the plaintiffs. Flowing from this we find that it was the credibility of witnesses that the appellant's counsel had taken exception to and had sought our intervention to reverse the findings of the court below based on this issue.

Having reviewed the factual evidence afresh, we find from the cold print of the notes of evidence that there was indeed conflict, awkward pauses, and general hesitancy in respect of both the plaintiffs' and defendants' witnesses, that may not have inspired confidence with the trial judge.

It would be apposite at this juncture to quote the judgment of Yong Pung How CJ in *Lim Teck Chye v. Public Prosecutor* [2004] 2 SLR 525, who at p. 541 captures the approach to be taken by an appellate court when asked to reverse the findings of a judgment of the trial court because of challenges in respect of credibility of witness evidence – as this is in essence what the appellants have asked us to do. This is what his Lordship had to say:

> 41. I noted that the courts have always taken a fairly broad approach in assessing the credibility of witnesses, and that any assessment of the veracity of a witness's testimony must be viewed in its totality. The case of *De Silva v. PP* [1964] 1 MLJ 81 stands for the proposition that contradictions, discrepancies and falsehoods in the evidence of a witness are not sufficient reasons for rejecting the whole of the evidence of such a witness. The question was therefore whether the alleged falsehoods and discrepancies would be sufficient to undermine the credibility of Henry Low. In *Leo Fernando v. R* [1959] 1 MLJ 157, Rose CJ considered discrepancies in the accounts given by various prosecution witnesses as "a matter which might well be thought to be in favour of their truthfulness rather than the reverse". In any event, even if a witness is found to have lied on a matter, it does not necessarily affect his credibility as a whole: *Khoon Chye Hin v. PP* [1961] 1 MLJ 105, *Samad bin Kamis v. PP* [1992] 1 SLR 340, *PP v. Kaplanah Singh* [1995] 3 SLR 564 and *Sandara Moorthy Lankatharan v. PP* [1997] 3 SLR 464.

42. I considered the approach taken in the cases of *Triptipal Singh v. PP* [1974] 1 MLJ 59 and *R v. Panayiotou* [1973] 3 All ER 112. Commentators have said these cases stand for the proposition that if an appellant seeks to reverse a judgment below by challenging findings of credibility on the ground that there are discrepancies in the testimonial evidence, *the appellate court will consider that if the trial judge had drawn attention to the discrepancies and considered them, there can be no further ground for complaint. This is given that the appellate court does not have the advantages of seeking and hearing the witnesses* (emphasis is ours). I did not, however, take these cases as expressions of a hard and fast rule although they were indicative of the high threshold that the appellant has to meet. The appellant may still incline an appellate court to re-assess a finding of credibility even if the trial judge had adverted to the discrepancies, but only if he can show that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain and justify the trial judge's conclusions as to credibility, thus rendering the verdict against the weight of the evidence: *Syed Jafaralsadeg bin Abdul Kadir v. PP* ([34] *supra*), *PP v. Victor Rajoo* [1995] 3 SLR 417. This could not be said of the assessment of Henry Low's credibility below.

43. In *Vinit Sopon v. PP* [1994] 2 SLR 226, I held that discrepancies in the evidence are inevitable in cases involving complicated factual details and that immaterial discrepancies ought to be disregarded if these are not of such a nature as to impair the strength of the prosecution case. Some of the discrepancies raised by the appellant fell into this category, and I disregarded them.

With the aforesaid principles borne in mind, do we find anything in the treatment of the witnesses evidence by the trial judge that warrants appellate interference? Admittedly, the flaw of the trial judge may have been in not adverting in his judgment to the said discrepancies in the evidence of the witnesses specifically. However, the trial judge had not rejected the evidence of these witnesses wholesale, but carved aspects of the evidence to support various strengths of the case, – see *Khoon Chye Hin v. PP* [1961] 1 MLJ 105. Having done so, the trial judge eventually plumped for the independent evidence of DW3.

We too, like the trial judge found a salvo in the non-partisan evidence of the solicitor DW3 responsible for the transfer of the land to the defendants from the deceased father. In doing so, we find support from the case *Watt v. Thomas* [1947] AC 484 at p. 486 where Viscount Simon had this to say:

> It not infrequently happens that a preference for A's evidence over the contrasted evidence of B is due to inferences from other conclusions reached in the Judge's mind, rather than from an unfavourable view of B's veracity as such: in such cases it is legitimate for an appellate tribunal to examine the grounds of these other conclusions and the inferences drawn from them, if the materials admit of this; and if the appellate tribunal is convinced that these inferences are erroneous, and that the rejection of B's evidence was due to the error, it will be justified in taking a different view of the value of B's evidence. I would only add that the decision of an appellate Court whether or not to reverse conclusions of fact reached by the Judge at the trial must naturally be affected by the nature and circumstances of the case under consideration.

Reverting to the facts at hand, we have examined afresh the evidence of the solicitor DW3 who had this to say in respect of the transfer of the said land from the deceased father to the 1st and 2nd defendants.

> DW3 Dato' Subbiah a/l Thevarayan – Dato' Subbiah a/l Thevarayan. Affirms, states in English. Advocates and Solicitor, 11, Penang Street, 10200 Penang. In 1972 I was in practice as an Advocate and Solicitor in High Court Malaya. I was doing conveyancing as well as civil practice.
>
> Shown – D page 1.
>
> Borang 14A.
>
> Page 2, 3. The signature on page 2 and 3 are mine. I can't remember the faces of those people who executed the transfer. They executed the transfer in my presence.
>
> Page 3 – These signatures were effected in my presence.
>
> Pg. 1 – RM3,000 I can't say whether it was paid in my presence or the vendor acknowledge receipt of the money. My practice if the money is not paid in my presence I would ask the vendor whether he had received the money. I was acting for both vendor an purchasers.
>
> Normally such documents are prepared in my office.
>
> Can't recall whether the Teoh Ah Pee executed the document, whether in my office or at the hospital.
>
> If vendor had conveyed the property in trust I would have said it in the document and I would prepare a trust deed which would be sent for registration together with From 14A. If any of them had instructed that the transfer was in trust I would have prepared it that way.

I can't remember whether money was paid in my presence. If cash was not paid in my presence I would have asked the vendor. Only if he confirms that I will prepare the document.

Valuation by stamp office is RM8,300.